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NO. 56563-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

J.C. MILLER,

Respondent,

v.

JOHN GARRETT SMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable David E. Gregerson, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
C. <u>ARGUMENT</u>	7
1. The trial court erred by inquiring into the legality of the judgment or process resulting in Mr. Smith’s incarceration and, relatedly, by dismissing the habeas corpus petition with prejudice	7
2. Construing the habeas corpus petition as a CrR 7.8 motion for relief from judgment, the trial court erred by not transferring the petition to the Court of Appeals for consideration as a personal restraint petition	14
D. <u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Lybarger</u> 2 Wash. 131, 25 P. 1075 (1891)	7
<u>In re Pers. Restraint of Adams</u> 178 Wn.2d 417, 309 P.3d 451 (2013)	11
<u>In re Pers. Restraint of Dalluge</u> 152 Wn.2d 772, 100 P.3d 279 (2000)	11
<u>In re Pers. Restraint of Ruiz Sanabria</u> 184 Wn.2d 632, 362 P.3d 758 (2015)	15
<u>In re Pers. Restraint of Runyan</u> 121 Wn.2d 432, 853 P.2d 424 (1993)	7, 8
<u>State v. Smith</u> 189 Wn.2d 655, 405 P.3d 997 (2017)	3

RULES, STATUTES, AND OTHER AUTHORITIES

CrR 7.8	1, 2, 3, 5, 14, 15, 16
Ch. 7.36 RCW	7, 12, 15
LAWS OF 1987, ch. 395, § 3	8
RCW 7.36.130	1, 2, 8, 12, 13
RCW 10.73.090	1, 4, 6, 8, 9, 10, 11, 12, 14, 15

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 10.73.100	6, 8, 9, 10, 14
RCW 10.73.130	14
RCW 10.73.140	4, 6, 10, 12, 14, 15

A. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing John Garrett Smith's petition for writ of habeas corpus with prejudice by inquiring into the merits of the petition to determine it was successive and barred by res judicata and collateral estoppel.

2. Alternatively, the trial court erred by treating Mr. Smith's petition as a posttrial motion for relief from judgment but not transferring the petition to the Court of Appeals pursuant to CrR 7.8(c)(2).

Issues Pertaining to Assignments of Error

1a. When a petition for writ of habeas corpus is filed, the legislature has provided in RCW 7.36.130 that no court or judge may inquire into the legality of any judgment or process whereby the petitioner is in custody and the commitment term has not expired pursuant to a final judgment of a court of competent jurisdiction except where a violation of constitutional rights is alleged and the petition is filed within the one-year time period established by RCW 10.73.090. Here,

the trial court did inquire into the legality of judgment or process despite finding the petition untimely, specifically addressing issues such as whether Mr. Smith's claim was barred as successive and by principles of claim and issue preclusion. By making inappropriate inquiries forbidden by RCW 7.36.130, did the trial court violate this statute?

1b. The trial court, in making its legal inquiries, dismissed Mr. Smith's habeas corpus petition "with prejudice" when it should have just denied it. Because this dismissal with prejudice has the potential to preclude Mr. Smith's filing of future meritorious habeas corpus petitions, should the order be reversed, and, to the extent the trial court determines no relief is warranted, should the trial court issue a new order specifying merely that the petition is denied?

2. Alternatively, the trial court and the state treated Mr. Smith's petition for writ of habeas corpus as a motion for relief from judgment under CrR 7.8 and the court specifically determined that the petition was time barred and successive,

and also that there was no entitlement to relief. Yet the court dismissed the petition outright rather than transferring it to the Court of Appeals for consideration as a personal restraint petition pursuant to CrR 7.8(c)(2). Was this additional procedural error that requires reversal of the order under review?

B. STATEMENT OF THE CASE

The underlying facts leading to Mr. Smith's incarceration are unimportant to this appeal. If desired, additional factual background may be gleaned from State v. Smith, 189 Wn.2d 655, 657-61, 405 P.3d 997 (2017). Mr. Smith is currently serving a sentence of 144 months for attempted second degree murder and second degree assault. Id. at 660; CP 34, 41.

In June 2021, Mr. Smith submitted a petition for writ of habeas corpus to Clark County Superior Court. CP 1-8. The petition contended that the superior court in which he was convicted lacked subject matter jurisdiction. CP 3-8. Specifically, he argued that the amended information that added a

charges of attempted murder, which was filed six months after the original information, had never been ratified by any court or judge. CP 3-5; compare also CP 45-46 (original information filed June 6, 2013) with CP 48-51 (amended information filed December 10, 2013). This lack of ratification, he asserted, meant that the superior court never obtained subject matter jurisdiction over the attempted murder charge, thereby voiding ab initio his conviction and sentence for this charge. CP 5-6. He named J.C. Miller, the superintendent of Larch Corrections Center where Mr. Smith is incarcerated, as the respondent to the habeas corpus petition. CP 1.

The Department of Corrections, represented by the Attorney General's Office responded to Mr. Smith's petition. CP 13-90. The state made three principal arguments in response: (1) Mr. Smith's petition was untimely under RCW 10.73.090, (2) Mr. Smith's petition was barred as a successive petition under RCW 10.73.140, and (3) Mr. Smith's petition was barred by res judicata or collateral estoppel principles because he had already

pursued these claims via personal restraint and habeas corpus petitions in the state and federal courts. CP 21-27; see also CP 60-61 (state court of appeals order dismissing personal restraint petition), 63-64 (state supreme court ruling denying review), 66-85 (federal district court magistrate report and recommendation on habeas corpus petition), 87-88 (order adopting magistrate's report and recommendation and denying habeas relief and certificate of appealability). Alternatively, the state argued that the superior court should transfer Mr. Smith's petition to the Court of Appeals for consideration as a personal restraint petition pursuant to CrR 7.8(c)(2). CP 27-28.

The Clark County Superior Court set a hearing to consider Mr. Smith's habeas corpus petition on November 12, 2021. The state and Mr. Smith made the same arguments reflected in their written submissions. RP 6-11. The trial court initially "den[ied] the petition for the reasons summarized by counsel here. It does appear to be barred by the provisions of the statute and/or a combination of the res judicata. With the issue already having

been dealt with and addressed, I don't think this court has the legal authority to grant the relief requested by the petitioner, so I'm going to deny that petition." RP 11.

The denial of the petition morphed into a dismissal of the petition with prejudice at a subsequent hearing on December 10, 2021, which was scheduled to present findings of fact and conclusions of law. RP 14-15. The December 10, 2021 order entered by the superior court stated the court "reviewed Petitioner's habeas corpus petition, Respondent's response, and the remainder of the record herein," and also noted it had heard oral argument from the parties. CP 91. The court's order read,

Petitioner's habeas corpus petition is DISMISSED WITH PREJUDICE because the Court finds that the petition raises the same claim and issue already adjudicated in a previous collateral attack and is there subsequent [sic] under RCW 10.73.140; barred under principles of claim and issue preclusions; and time-barred under RCW 10.73.090 and RCW 10.73.100.

CP 91.

Mr. Smith filed a timely notice of appeal. CP 93-94.

C. ARGUMENT

1. **The trial court erred by inquiring into the legality of the judgment or process resulting in Mr. Smith's incarceration and, relatedly, by dismissing the habeas corpus petition with prejudice**

The procedure for considering a petition for writ of habeas corpus is set out in chapter 7.36 RCW. This statute is generally consistent with the treatment of the writ at common law, which provided that a petition for writ of habeas corpus was defeated “merely by showing that: ‘the petition was held by any process or judgment good upon its face [which] not only precluded inquiry into the validity of such process or judgment, but also precluded inquiry as to the facts of his being held by such process or judgment at all.’” In re Pers. Restraint of Runyan, 121 Wn.2d 432, 442, 853 P.2d 424 (1993) (alteration in original) (quoting In re Lybarger, 2 Wash. 131, 134, 25 P. 1075 (1891)).

As the Runyan court explained, “In 1947, the Legislature amended the statute governing the scope of judicial inquiry in habeas cases to allow inquiry into the facts and process behind

the judgment in cases where the petition alleged a constitutional violation.” Runyan, 121 Wn.2d at 443 (citing RCW 7.36.130(1)). RCW 7.36.130 has been amended only once since 1947, to incorporate the collateral attack time limitations provided in RCW 10.73.090 and RCW 10.73.100. See LAWS OF 1989, ch. 395, § 3 (codified as amended at RCW 7.36.130(1)).

RCW 7.36.130 is the statute that controls the scope court’s inquiry when presented with any habeas corpus petition. It provides, in pertinent part,

No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge the party when the term of commitment has not expired, in either of the cases following:

(1) Upon any process issued on any final judgment of a court of competent jurisdiction except where it is alleged in the petition that rights guaranteed the petitioner by the Constitution of the state of Washington or of the United States have been violated and the petition is filed within the time allowed by RCW 10.73.090 and 10.73.100.

The trial court erred in failing to follow RCW 7.36.130 in this case. The trial court’s order determined, among other things,

that the petition was “time-barred under RCW 10.73.090 and RCW 10.73.100.” CP 91. This determination should have been dispositive under the statute and demonstrates the trial court’s lack of compliance with the limited inquiry under RCW 7.36.130. As the statute indicates, unless the habeas corpus petition alleges a violation of constitutional rights *and* is filed within the time allowed by RCW 10.73.090 and RCW 10.73.100, the trial court is not empowered to inquire into the legality of any judgment or process whereby the petitioner is in custody. Because the trial court determined that Mr. Smith’s petition was not timely filed, it lacked any statutory authority to make any other inquiry, let alone decide one.

The trial court’s order dismissing the habeas corpus petition shows it failed to comply with the statute’s directive. The trial court’s order states that it reviewed not only the pleadings submitted by the parties but “the remainder of the record herein,” indicating that it did in fact inquire into the legality of the judgment or process whereby Mr. Smith is

incarcerated. In addition, the trial court passed on other legal questions, including that Mr. Smith's petition "raises the same claim and issued already adjudicated in a previous collateral attack and is therefore subsequent under RCW 10.73.140" and "barred under principles of claim and issue preclusion." CP 91. Reviewing the record and making other legal determinations about Mr. Smith's petition were actions taken in error. If the trial court determined that Mr. Smith's petition was untimely under RCW 10.73.090 and RCW 10.73.100, then it had no authority to make these additional inquiries. Its order dismissing Mr. Smith's petition should be reversed because the order exceeds statutory authority.

It is conceivable that Mr. Smith's petition is timely under RCW 10.73.090 and RCW 10.73.100 because it presents a jurisdictional question. Although the trial court did not address this issue, it is helpful to understand it for the purpose of remand. RCW 10.73.100(5) provides an exception to the time bar that "[t]he sentence imposed was in excess of the court's

jurisdiction[.]” RCW 10.73.090 also contains a jurisdictional exception to the time bar: “No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.” RCW 10.73.090(1). As the state’s pleadings below acknowledged, jurisdictional questions are generally not time barred. CP 22 & n.3 (conceding that RCW 10.73.090 contains “two preconditions for the time bar’s application”—facial validity of the judgment and entry of the judgment by a court of competent jurisdiction) (quoting In re Pers. Restraint of Adams, 178 Wn.2d 417, 424, 309 P.3d 451 (2013) (holding lack of jurisdiction is of two “narrow ‘exceptions’ to the time limit” in RCW 10.73.090); In re Pers. Restraint of Dalluge, 152 Wn.2d 772, 779-85, 100 P.3d 279 (2000) (acknowledging same)).

Thus, it is possible the trial court could correctly consider (and could have already considered) Mr. Smith’s petition and

decide it on its merits under RCW 7.36.130. It could determine that Mr. Smith's petition claims a constitutional violation and that it was filed within the time allowed under RCW 10.73.090 and RCW 10.73.100. In this circumstance, the trial court could inquire into the legality of any judgment or process whereby Mr. Smith is in custody and then could decide his claim on its merits.

The problem here is that the trial court, at the state's behest, did neither of the correct things. If the petition was untimely, as the trial court found, then it could not make any further legal inquiries and therefore erred by passing on questions of res judicata, collateral estoppel, and whether the petition was a successive petition under RCW 10.73.140.¹ If the petition was timely, then the trial court had an obligation to inquire into the process by which Mr. Smith is currently in custody and decide whether process was legal. Because the trial court failed to

¹ The successive petition bar does not appear to apply to habeas corpus petitions, such as the one at issue here. RCW 10.73.140 is not referenced anywhere in the entirety of RCW chapter 7.36 RCW and therefore is no impediment to habeas corpus relief.

comply with RCW 7.36.130 in any respect, the trial court erred and its order reflecting its error must be reversed.

Finally, and relatedly, it was error for the trial court to dismiss the habeas corpus petition with prejudice. If the trial court believed the petition was untimely, it should have denied the petition, not dismissed it with prejudice. If the trial court were to find the petition was timely and raised a constitutional violation, but nevertheless found the petition meritless, it should deny the petition, not dismiss it with prejudice. A dismissal with prejudice, as occurred here, has the potential to foreclose future habeas corpus claims brought by Mr. Smith. It is possible that the law could change or that new evidence could emerge that warrant reconsideration of habeas relief. But with a dismissal with prejudice, a future court faced with these claims might not even provide an opportunity to consider them. The dismissal with prejudice was unnecessary, was not supported by any statute or case law, and places an undue burden on Mr. Smith's ability to seek further collateral relief. If the trial court wishes to deny Mr.

Smith's instant petition, so be it, but its decision to dismiss habeas relief with prejudice was erroneous and this aspect of the trial court's error must also be reversed.

2. Construing the habeas corpus petition as a CrR 7.8 motion for relief from judgment, the trial court erred by not transferring the petition to the Court of Appeals for consideration as a personal restraint petition

In the alternative, the trial court appeared to be considering Mr. Smith's habeas corpus petition as a postjudgment motion for relief from judgment under CrR 7.8(c)(2). Indeed, as noted above, RCW 10.73.140's bar on successive petitions does not appear to apply to habeas corpus under chapter 7.36 RCW, but it is a basis to deny a 7.8 motion. See CrR 7.8(b) (noting 7.8 motions are "further subject to RCW 10.73.090, .100, .130, and .140" (emphasis added)). In addition, as also discussed above, the trial court inquired into Mr. Smith's claims inasmuch as it denied them based on claim and issue preclusion principles.

To the extent that the trial court treated Mr. Smith's habeas corpus petition as a CrR 7.8 motion, the trial court erred by not

transferring the petition to the Court of Appeals to be considered as a personal restraint petition.

CrR 7.8(c)(2) reads in its entirety,

Transfer to Court of Appeals. The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

See also, generally, In re Pers. Restraint of Ruiz Sanabria, 184 Wn.2d 632, 638-40, 362 P.3d 758 (2015) (discussing transfer requirements under CrR 7.8(c)(2)).

The trial court's order determined Mr. Smith's petition was barred by RCW 10.73.090. The trial court's order determined that Mr. Smith had no made a substantial showing he was entitled to relief by virtue of "principles of claim and issue preclusion" and under the successive petition bar of RCW 10.73.140. CP 91.

These determinations required a transfer to the Court of Appeals under CrR 7.8(c)(2). Under the rule, transfer is required

whenever the petition is not timely and either (1) there is no substantial showing of entitlement to relief or (2) resolution of the petition will not require a factual hearing. Because the trial court found no showing of entitlement to relief and that the petition was untimely, the trial court erred by failing to transfer Mr. Smith's petition to the Court of Appeals for consideration as a personal restraint petition. The trial court's order dismissing Mr. Smith's petition was error.

The trial court neither followed the statutory procedures under chapter 7.36 RCW governing habeas corpus petitions nor the court rule procedures under CrR 7.8. The trial court's erroneous order entered in excess of its authority should be reversed and this matter should be remanded to the trial court for compliance with the laws.

D. CONCLUSION

The trial court, in dismissing Mr. Smith's habeas corpus petition with prejudice, failed to follow proper statutory procedures governing habeas corpus petitions. Alternatively, the trial court failed to follow proper court rule procedures governing motions for relief from judgment. The trial court's order should be reversed, and this case should be remanded for the trial court to enter a legally compliant order.

DATED this 18th day of August, 2022.

I certify this document contains 2,898 words. RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC

A handwritten signature in black ink, appearing to read 'Kevin A. March', written over a horizontal line.

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